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ABSTRACT

One of the most frequent problems confronting employers is the need to investigate allegations of or suspicions that an employee has been involved in misconduct and take appropriate action when the evidence substantiates the wrongdoing. School district employers are no exception. Respect and trust in the school working environment are achieved by fair, objective, and firmly enforced disciplinary procedures, including fair investigation techniques. While investigations of alleged wrongdoing by employees are not limited by the restrictions of criminal laws, the investigation should be conducted in a manner that allows any wrong to be detected but that protects the interests of the accused. Intended to provide practical tips for handling these investigations and detailing a variety of investigative techniques, this document examines: (1) the legal climate; (2) the report of the alleged wrongdoing to school authorities; (3) common areas of complaint; (4) conducting the investigation; (5) relationships with outside agencies; (6) making the decision; (7) the role of the employee representative; and (8) media relations. Successful investigations begin with planning and end with a result. It is between these two points that considerable leadership and skill must be applied. Various sample forms and letters regarding complaints, administrative suspensions, and concerns are appended. (16 references) (KM)

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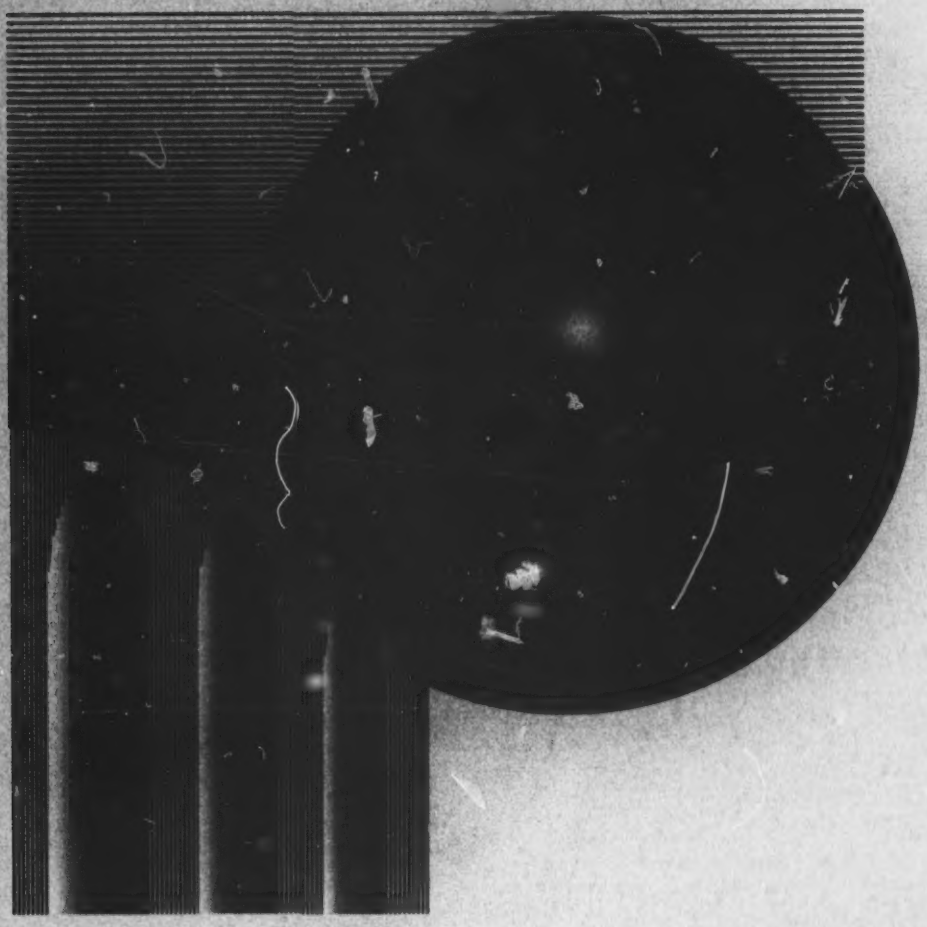

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Investigating Alleged Wrongdoing by Employees in the School Setting

An NSBA Council of School Attorneys Publication

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INVESTIGATING ALLEGED WRONGDOING BY EMPLOYEES IN THE SCHOOL SETTING

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NSBA promotes the quality of education through services to Federation Member state school board associations and local school districts. Federation members of NSBA include the 49 state school boards associations, the Hawaii State Board of Education and the boards of education in the District of Columbia, and the U.S. Virgin Islands. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

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Since 1967 the National School Boards Association's Council of School Attorneys has provided information and practical assistance to attorneys who represent public school districts. As the only national advocacy organization composed exclusively of attorneys representing school boards, NSBA's Council advises NSBA and its members on school law issues. It offers continuing legal education programs, produces specialized publications, and provides up-to-the-minute analysis of the issues. Council seminars are valuable forums for school attorneys to exchange ideas and information.

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FOREWORD

One of the most frequent problems confronting employers is the need to investigate allegations of or suspicions that an employee has been involved in misconduct and to take appropriate action when the evidence substantiates the wrongdoing. School district employers are no exception. Due to the application of countless state and federal constitutional, statutory, and regulatory provisions, the importance of fair and objective investigations and discipline is even more pronounced in the public school setting.

This monograph is intended to provide practical tips for handling these investigations in a manner to ensure fair treatment for the accused while affording appropriate and efficient remedies to the school employer. It is not, however, intended as legal advice. Each investigation is different, so a qualified school attorney should be consulted as the need arises.

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INVESTIGATING ALLEGED WRONGDOING BY EMPLOYEES IN THE SCHOOL SETTING

THE LEGAL CLIMATE

Public schools are political subdivisions of the state, and they generally receive federal financial assistance. As a result, activities of school districts and school officials constitute "state action" under the Fourteenth Amendment making federal constitutional guarantees applicable to public school employees. In addition to the application of the Constitution, civil rights statutes such as 42 U.S.C. § 1983[1] also apply. Also significant is the fact that the provisions of 42 U.S.C. § 1988 allow for the recovery of attorneys' fees in successful civil rights suits. The concern for incurring the risks of these damage claims and attorneys' fees requires careful attention to procedures when dealing with public school employees.

Dealing with employees in this legal climate begins with the thoughtful promulgation of policies and procedures which ensure compliance with the law. These policies and procedures are useless, however, unless they are carefully followed and enforced. It should be kept in mind that generally, when courts are reviewing claims in the school arena, they will look first to see if there were any policies and procedures in effect, and if so, whether they were followed. If these inquiries are satisfied, administrators and boards stand a significantly better chance that their judgments will be supported by a court.

In addition to board policies, procedures, and regulations, school boards must also contend with the legal framework created by negotiated agreements, employee contracts, handbooks, manuals, and arbitration and court decisions interpreting them. Even though most of these regulatory influences come into play when managing employee misconduct and discipline, the common theme in their adoption or application should be the assurance of fair treatment to the employee.[2]

Distinction from the Criminal Context

Achieving fairness and providing due process in the workplace does not mean that employees who are accused of or suspected of wrongdoing are entitled to all the standards of investigation and prosecution that would apply in a criminal setting. To the contrary, courts have traditionally recognized that the public employer has a substantial interest in investigating misconduct and in dealing with employees in a more informal way that does not impose significant administrative burdens or intolerable delays.

In the past, when the Supreme Court has been confronted with the request to impose criminal law standards on investigating misconduct in the schools or public workplace, it has resisted, applying instead more relaxed standards. For example, in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court developed a "reasonable suspicion" standard to be applied to a personal search of a student in school for disciplinary purposes, dispensing with any requirement for obtaining a warrant. This is significantly less onerous than the "probable cause" and warrant requirements applicable to criminal investigative searches. The standard of *T.L.O.* has similarly been carried over to searches within a public employment context.

The public employee case, *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987), involved the search of a state employee's office, desk, and file cabinets at his place of work. The Court's plurality discussion of the applicable standard to be applied in these public workplace searches is instructive on the differences from the more formal, criminal context. "In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." *O'Connor* at 1499. Referring to *T.L.O.*, the Court again affirmed the unsuitability of applying criminal standards "because such a requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."

The Supreme Court in *O'Connor* at 1501-02 sums up this distinction best:

> Even when employers conduct an investigation, they have an interest substantially different from "the normal need for law enforcement." [Citation omitted.] Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement or other work-related misfeasance of its employees. Indeed, in many cases, public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe. *In contrast to law enforcement officials, therefore, public employers are not enforcers of the criminal law; instead, public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner.* [Emphasis added.]

In conclusion, the Court stated that intrusions on the constitutionally protected privacy interests of government employees for work-related reasons as well as for "investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *O'Connor* at 1502. This standard is similar to the reasonable suspicion standard of *T.L.O.*, only applied to the employee setting.[2]

The Due Process Standards

This monograph will analyze in detail the kinds of standards which are "reasonable" in investigations within the public employment arena. The courts have offered little guidance in conducting the investigation prior to the institution of a proposal to terminate or otherwise discipline an employee. They have, however, spoken to the requirements of due process once the allegations have narrowed to an employee and there is a proposal to deprive the employee of a contract or other property right. In the public employment context, these pretermination standards have been articulated by the Court in straightforward guidelines:

> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.
>
> *Loudermill v. Cleveland Board of Education*, 470 U.S. 532, 546 (1985).

The Supreme Court in *Loudermill* outlined the general ingredients for providing due process to public employees prior to dismissal or suspension without pay, stating that the employee is entitled simply to (1) oral or written notice of the charges against him; (2) an explanation of the employer's evidence; and (3) an opportunity for the accused to present his side of the story. *Id.* "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.*

In general, then, fairness in dealing with employees accused or suspected of wrongdoing, who ultimately may be terminated, will be guided by first, an individualized investigation reasonable to the circumstances, and then, notice of the charges, a disclosure of the evidence, and an opportunity to respond prior to termination.[3]

The Importance of Policies and Personnel Practices

Respect and trust in the school working environment are achieved by fair, objective, and firmly enforced disciplinary procedures, including fair investigation techniques. As in effective student discipline, fair treatment of employees starts with clearly articulated, yet simply stated, reasonable standards of conduct set forth in objective employee discipline policies.

These discipline policies and the personnel practices which implement them should have as their primary goals the prevention of misconduct and the improvement of performance. They should not, however, limit or foreclose disciplinary action when necessary. This is accomplished by setting clear, concise, and reasonable standards and expectations of behavior, making these known to all employees, then applying them objectively and even-handedly.

In the development of policies and handbooks, consider whether the school district's employees have a property interest in their employment, i.e., an entitlement to continued employment that can only be interrupted for good or just cause. If employees are employed at the will of the board with no definite term, the adoption of policies and handbooks delineating causes for termination can inadvertently convert the "at will" relationship into a constitutionally protected property right to continuous employment.

THE REPORT OF THE ALLEGED WRONGDOING TO SCHOOL AUTHORITIES

Reports of wrongdoing may come from a variety of sources including students, parents, or other patrons of the school district, other employees, board members, law enforcement officials, or the media. The source and identity of the complainant or reporter and the nature of the accusations will affect the process and extent of the investigation.

Anonymous Tips

Anonymous tips of alleged wrongdoing can, in some very limited circumstances, be relied upon to initiate an investigation of an employee. However, great care must be taken to avoid accusing an employee of wrongdoing based upon an anonymous tip alone without other corroborating evidence. People who do not identify themselves in making allegations against others will surely not be of any assistance at any point in the investigatory or disciplinary process. Unless the employee admits to the conduct or independent evidence is obtained, a cooperative witness will be needed to prove the allegations.

When an anonymous tip is received orally, an attempt should be made to convince the person to identify him or herself. If the informer will not, unless retaliation is feared or some other legitimate consideration is given, there is little reason to consider the accusation genuine, and credibility is immediately suspect. One method to encourage the person to identify him or herself is to pledge that the informer's identity will be kept confidential to the extent permitted by state law, but only unless and until charges are actually brought. Even then, if other sufficient evidence is obtained, confidentiality may be able to be preserved, but no promises to that effect should be made.[4]

Some accusations made anonymously may be of such a serious or sensitive nature that some follow-up must be made. A good example here is suspected or alleged child abuse which by many state laws must be reported to state agencies even though the information is received anonymously. Other anonymous claims may be deferred for investigation in the ordinary course of business, perhaps coincident with an annual financial audit or periodic departmental management review. Otherwise, anonymous tips alone rarely provide enough to warrant action. On some occasions anonymous tips are made to discredit or set up an employee. If this is suspected, it may serve a legitimate purpose to advise the employee of the tip and see what the employee has to say about it. Furthermore, if the employee was in fact engaged in any misconduct, advice of the tip can often deter future improper action. If the anonymous tip cannot be corroborated or if an investigation based upon it is not conducted to a conclusion, then no record of it should be made which could adversely affect the employee.

Verbal Complaints

Upon receipt of a verbal complaint from a known source, reasonable efforts should be made

to promptly reduce it to writing, preferably in the complainant's own handwriting. Reducing the complaint to writing or to a signed statement will help assure that the informer will testify as a witness, that he or she will not experience a convenient memory lapse later, and that the employer will not be accused of bad faith if the witness later withdraws the claim or fails or refuses to cooperate. If the complainant is unwilling to place the allegations in writing, the claim will suffer from many of the same problems and inadequacies as an anonymous tip and, in the absence of independent corroborating evidence, may not be sufficient to justify pursuing.

Written Complaints

Written complaints or statements reduced to writing, identifying the person(s) making the claims, will, with few exceptions, always justify an investigation. Placing accusations in writing is itself some independent assurance that the claim of wrongdoing, or at least the perception by the complainant, is genuine.

Many school districts have policies and procedures concerning how and to whom complaints by patrons and employees should be made. Sample policies are provided as Appendices A-1, A-2, and A-3. These policies may include not only complaints by students, parents, or third persons, but also, carefully drawn chain-of-command policies to be followed by employees. Because public complaints or public disclosure of complaints may implicate a person's reputation and affect protected liberty interests, persons should be actively discouraged from making accusations about employees by name (or by sufficient specificity to identify the employee) at public board meetings. Where the state open meetings act permits, these complaints should be made in closed sessions or in writing. For the same reasons, care must be taken to maintain the confidentiality of written complaints, consistent with applicable open records laws, until acted upon or resolved.

Appendix B is a sample complaint form.

Criminal Complaints

Some complaints may allege criminal activity or may in fact be initiated by police authorities for conduct related or unrelated to the workplace. Regardless of how these complaints arise and regardless of whether law enforcement officials are involved, if the employer feels that the accusations could involve and have a nexus to the employment relationship, an independent, administrative investigation should be undertaken in virtually every case.

As mentioned at the outset, the standards applicable to investigations in the workplace are different from those conducted by the police. Evidence of wrongdoing, insufficient to sustain a criminal conviction, may be more than adequate to justify discipline or discharge. In some instances, the silence of the accused may be used to infer wrongdoing in the employment context, where the privilege against self-incrimination would prevent such an inference in a criminal proceeding.[5] The timing of the investigation and disposition of the employment decision usually will proceed independently of and faster than the criminal proceedings. The courts have typically held that employers may not be enjoined from investigating and acting upon job-related complaints, even though the complaints may also be the subject of a pending criminal prosecution.[6]

One of the problems encountered when the police control the evidence is that the fruits of their investigation may not be available to school authorities to use at a termination hearing. Prosecutors will often not want to expose their witnesses to cross-examination or disclose their evidence at a termination hearing before the criminal trial. Access to a prosecutor's witnesses or evidence usually depends upon the school authorities' relationship with the prosecutor and the prosecutor's view of how his or her criminal case could be influenced by the termination proceeding. If the prosecutor will not provide the evidence and it is not available from other sources, such as through subpoena, the employee discipline matter may have to be put on hold. Suggestions for obtaining information during a criminal investigation are discussed on page 22.

Further or Other Alleged Wrongdoing Arising out of an Investigation

Many times an investigation into a specific incident or accusation may expand into other claims, persons, or incidents. For example, a complaint of employees drinking in the parking lot after work hours may, upon investigation, lead

to evidence of widespread alcohol or drug abuse among an employee group. The key considerations here must be to not close the door or act on a complaint precipitously. Wait until the investigation is complete. Should disciplinary action be taken before other revelations of misconduct come out and are investigated, evidence of the wrongdoing can be lost. However, if later discovered, evidence of other wrongdoing should be pursued in the same manner as the initial case. Criminal procedural standards do not apply and double jeopardy defenses will not prevent the district from taking employment action when subsequent evidence is obtained.

News Media Reports

The media may often be a source of accusations against school employees. Reporters generally do not discount the anonymous tip in the same manner administrators do, and an otherwise anonymous "tipster" will often talk to reporters who promise absolute confidentiality. When claims do surface through the media, they should be independently and promptly investigated. Reliance should not be placed upon news accounts for evidence; rather, independent statements, even from the investigative reporter, should be obtained when possible. It should be kept in mind that the information from an anonymous tipster may not justify taking action, even if the tipster has found a reporter's ear. A school administrator investigating the matter may never be able to talk with the reporter's source.

Dealing with the "Whistle Blower"

Many states have enacted statutes providing special protection or privileges to those employees who come forward to report violations of laws by governmental officials or other workers.[7] Under these circumstances, employee-"whistle blowers" are typically accorded immunity from recrimination for reporting, even if they circumvent established chain-of-command procedures. Good management procedures dictate that when complaints are lodged "out of management sequence," they should be subtly referred back to the appropriate level supervisor. The supervisor should also be made aware of his or her responsibility to deal with the issue and not "pass the buck." This promotes resolving complaints informally at the immediate supervisory level. An exception to this general rule is that a whistle blower should not be required to report a violation of the law to the person who violated it if there is a perceived threat of recrimination.

Some employees become "professional allegators," attempting to insulate themselves from their own work-related inadequacies by reporting on others. Although courts have stricken down policies, either formal or unwritten, that prevent employees from reporting matters of "public concern" directly to public officials *(e.g.,* to the board of education), many states permit the discipline of persistent whistle blowers for their work-related inadequacies.

For example, these employees may be given specific directives to report just the facts of matters for which they have personal, direct knowledge, or observation. They can be required to articulate good reasons to support the charges, preferably documented with independent evidence. Employees may generally be disciplined for reporting under the following circumstances:

- Where the allegations are false, whether or not they may be damaging to the employee or the school district.
- For persistent reports based upon differences of opinion as opposed to clear, factual observations of violation of rules.
- For accusations motivated by or which involve self or private interests instead of matters of public concern.
- Where there appear to be no justifiable reasons for circumventing the chain-of-command.
- Where the reporting or disclosure is made in breach of departmental rules or of confidential information.
- When the reporting in violation of applicable procedures continues after prior directives have been given.

Care must be exercised to avoid disciplining an employee for actions or in a manner which is in-

consistent with the state's whistle blower statute. Although there are similarities in whistle blower statutes, their wording and courts' interpretations differ, so each statute must be independently applied.

COMMON AREAS OF COMPLAINT

The breadth, degree, and timing of any investigation will be determined in large measure by the nature of the complaint. Whether the conduct or incident may involve one or several persons; whether potential criminal prosecution may follow; whether the conduct is suspected to be habitual or incidental; and whether the actions occurred on or off school premises or on or off-duty hours are some of the questions which should be considered from the outset. Where the complaint involves off-duty misconduct, the burden for the school to carry in discipline will include not only establishing the facts of what happened but also how the actions substantively and adversely affected the operations of the school district or the employee's effectiveness to perform his or her job.[8]

There are many types of complaints which occur with some frequency in the school setting. Although every investigation will be different, in these recurring areas the investigation plan can likely be developed based upon prior ones. Standardized questions, outside agency contacts and telephone numbers, and prior arbitration decisions are just a few of the documents which can serve as a starting point. The common areas include:

- Misuse or misappropriation of funds, equipment, materials, or personnel.
- Sexual harassment or sexual misconduct.
- Drug or alcohol abuse.
- Mistreatment of children, including child abuse, injury to a child (physical or psychological), misapplication of corporal punishment laws and policies, and criminal charges.
- Theft.
- Conflicts of interest.
- Kickbacks or embezzlement of funds.

CONDUCTING THE INVESTIGATION

Conducting a fair investigation requires adherence to the following overriding practical guidelines: a recognition and preservation of the dignity of the individual, treating the accused in a manner in which the investigator would expect to be treated if he or she were the subject of the investigation, and presuming innocence until the investigation is complete. With these goals in mind, the investigator will not only have a greater likelihood of discovering the facts but will also significantly help assure that the decision made at the conclusion of the investigation will be upheld.

In addition to these general principles, investigations should be carefully planned in advance, systematically conducted, impartial (objective), confidential to the extent permitted by state law, and timely. To assure these goals, some school districts establish structured procedures concerning how investigations will be conducted. These procedures have the advantage of promoting thoroughness, consistency in application, avoiding improper actions by investigators and the use of improper or inappropriate investigative techniques, and allowing all employees to understand in advance what to expect if they are accused of misconduct. A disadvantage is that the procedures may become too restrictive and not allow the flexibility required to properly investigate different varieties of complaints. Such standardized procedures should ordinarily not be formalized into adopted board policies because to do so might create an "entitlement" argument which would convert an "at will" employment relationship into one where discharge may only be "just cause." *See eg., Loudermill,* 470 U.S. at 542. In addition, failure to substantially follow adopted board policy or procedure may itself become an alleged violation of due process or an alleged violation of contract under state laws with respect to the affected employee.[9] Some courts have even held that an employment manual in the private sector creates rights enforceable under contract principles.[10]

Receiving the Complaint

The beginning point of a civil or criminal investigation is essentially the same. It starts with the receipt of the complaint. Based upon this, the matter to be inquired into must then be defined, the sources of available information must be identified, and the investigation must be initiated and continued through to some disposition.

Complaints against employees should be as factually accurate, complete, and as timely as possible. This is dependent upon who provides and records the information. To promote efficiency in this process, standard complaint forms can be developed and personnel should be instructed in how to complete them. A simple guideline of "who, when, where, what, how and why," if addressed will go a long way here. In recording the complaint, the "Jack Webb theory" is important to keep in mind; that is, "Just the facts, ma'am, just the facts." Avoid writing conclusions or opinions in the complaint which are not justified. Do not include statements or make references to matters which may inadvertently affect or implicate civil rights or the exercise of constitutional rights such as free speech or association.

Consideration must also be given to whether the complaint's confidentiality can or needs to be protected. Most people assume that somehow merely by placing the word "confidential" on a document, it will not be disclosed or discoverable. This is not true in the public employment context. When preparing a document, it is wise to consider that it may eventually have to be disclosed to or discovered by the person who is the subject of the document. One should determine how to best preserve the confidentiality of the complaint during the investigation under the school district's state open records law. One approach used to accomplish this is to involve the school attorney early in the process. In some states the involvement of the school district's legal counsel in the investigation will cause the results of the investigation to be confidential via the attorney work product or the attorney-client privilege.

Careful planning to protect the confidentiality of investigatory materials promotes cooperation during an investigation and in future inquiries. (For a full discussion of the policies regarding confidentiality, see Page 16.) Nondisclosure of evidence is crucial, at least during the investigation. If no charges are filed against the suspected employee, then the results of the investigation should be kept confidential to the extent permitted by law. However, if charges are filed, then the investigatory materials will need to be available for later proceedings against the employee. Documentation is therefore very important to the success of any investigation.

It is also important to avoid the "cc" syndrome. Copies of complaints should be made and distributed only as are absolutely, minimally necessary. Many lawsuits result simply from inadvertent remarks made to inappropriate persons or from disclosing private facts to the public.

Determining Whether an Investigation Is Necessary and How It Should Be Conducted

The first order of business after a complaint is received is to determine whether an investigation by the school district is even necessary. This will depend on such considerations as the nature and seriousness of the allegations, the extent of other employee involvement, whether the allegations have been admitted, or whether the matter can be established by the testimony of the complainant alone. Employee relations concerns must also be considered. For example, while drug testing may uncover substance abuse among employees, it may create serious personnel problems if not handled properly.

After the complaint is received and an investigation appears warranted, it is important to act promptly. Facts become stale and memories fade. If a reasonable person would believe that the accused poses a risk to the students or to the school's operation and state law and local policies permit, consideration should be given to placing the employees on administrative leave with pay pending the completion of the investigation. (See the administrative leave, discussion on page 21.) An investigation plan must be developed. This "game plan" should include an identification of the investigative techniques to be used, the witnesses to be interviewed, the documents to be reviewed, the places or items to be observed or analyzed, and the sequence of each. Priorities must be set and estimated time-

lines should be developed. Consideration should be given to the following:

- Interview those persons first who may not be available later, whose willingness to cooperate may diminish, or whose accurate recollection must be preserved (*e.g.*, an eyewitness).

- Observe, photograph, and/or take control over things or locations which may not be available later or which may change.

- Interview persons next who are perceived to have the most extensive or fundamental information (usually includes the complainant).

- Interview those with less extensive information which is relevant but not critical.

- Interview hostile witnesses near the end of the process.

- Many feel it is advisable to interview the accused last. This is especially important when the disclosure of the investigation to the accused could cause other witnesses not to talk or for evidence to disappear. In some cases, the accused may be able to resolve the entire issue and should be interviewed near the beginning of the investigation. Regardless of when the accused is interviewed in the process, the interview should not be unduly delayed. The most effective way to accomplish this objective is to promptly conclude the investigation.

- In certain cases, it may be desirable to have the accuser confront the accused. Some policies and negotiated agreements require this, and often the confrontation will establish the truth or falsity of the allegations. When this is done, reasonable safeguards should be implemented to protect the rights of both the accuser and the accused.

In determining the investigative techniques to be used, consider the following:

- Is the technique *(e.g.,* surveillance, undercover informant, polygraph, drug/alcohol testing, sworn affidavit, search, etc.) supportable by justifiable reasons; what are these reasons; and which are the least intrusive to achieve the desired result?

- Will the technique supply a significant, necessary piece of evidence?

- What will be done with the evidence, if secured? For example, what will be done with the results of a polygraph or drug test? Will it be considered direct, conclusive evidence or a rebuttable presumption; will it have an effect on credibility?

- Are the results of the technique reliable?

- Will the technique appear to the public and/or ultimate decision-maker to strike and maintain a fair balance between the rights of the administration and the rights of the employee, or will it appear to be oppressive?

- Are the procedures consistent with the philosophy of the district toward its employees?

- How will the investigation technique affect labor peace and employee relations?

Personnel Conducting the Investigation

In an effort to resolve complaints at the initial, informal level, the immediate supervisor of the accused employee should ordinarily be responsible for the investigation. Exceptions to this general rule would include circumstances where the supervisor is involved in filing the complaint, where the supervisor him or herself may be the subject of the investigation, where the supervisor's involvement would "taint" the decision, or where the complainant or witnesses may not be

comfortable or candid in the investigative interviews. Examples of this latter consideration would be a sexual harassment complaint where it may be helpful to allow the complainant to report to a supervisor or administrator of the same sex or a child witness who may be more comfortable reporting to someone familiar or who has special training in interviewing children. The immediate supervisor should be expected to exert and demonstrate leadership in the investigation and to maintain control over his or her areas of the school or department. The supervisor is the person most likely to know the environment and the personalities involved, and the supervisor should not be allowed to "pass the buck" to a superior. The supervisor must demonstrate leadership in the investigation to successfully operate a department or head a school.

If, for any reason, it is inappropriate to involve the immediate supervisor in the investigation, it is generally best to resort to the next level of administrator in the same department, the same level supervisor in a related department, the security chief, or someone from the personnel department. Whoever is identified, it is of critical importance to have that same person involved in every interview.

In sensitive matters or investigations of significant potential consequences, the school district's attorney may supervise the process. Private investigators can also be effective. When it is determined to go to an outside investigator, it is important to have the school district attorney retain the investigation and direct the inquiry. The report should also go to the attorney. In this way, the confidentiality of the results of the investigation can generally be maintained by the attorney-client privilege or attorney work product until a decision is reached by the administration on how to proceed. Private investigators also have the significant advantage of being able to testify at disciplinary or termination hearings with detached, independent credibility.

The school attorney should avoid becoming a fact witness which will generally disqualify the attorney from prosecuting a termination or representing the district in subsequent litigation. When this involvement becomes a real possibility, many districts are now employing independent counsel to investigate and report to the administration or board. This permits the regular school counsel to perform usual and regular services to the district and represent the district in the matter.

The school district's independent auditors are also a source of potential investigative assistance. They are separated from the daily process and in some states enjoy similar, recognized privileges which can protect the confidentiality of the facts until they can be analyzed and a course of action determined.

Police agencies or county or district attorneys should normally be advised if the investigation produces evidence of possible criminal activity. The facts and evidence can be shared with these agencies and they can determine whether criminal prosecution should be initiated. In states where suspected child abuse must be reported, the appropriate police authorities should be notified immediately and a follow-up written report should be promptly filed. Regardless of whether these agencies determine to prosecute under the criminal law, the school district should always make an independent judgment about whether to investigate itself and pursue employment actions based upon job-related standards of conduct.

Interviewing the "Allegator" and Other Witnesses

After identifying the person to be in charge of the investigation and the development of an investigation plan, the first step is normally to interview the complainant. It should be kept in mind that this interview is just the beginning of the investigation and that the accused must be presumed innocent until facts show the misconduct. There is a tendency for investigators to try to gather information to prove what they have already determined or suspect to be true rather than what actually happened. Focus on the *facts;* avoid conclusions at this stage. Get the "who," "what," "where," "how," and, if relevant, "why."

In the interview of the complainant and non-hostile witnesses, the following guidelines should be considered:

- To put the witness at ease, consider interviewing at or near his or her area of work, one-on-one (one may want to do the opposite with the hostile witness).

- Unless urgent, accommodate the person interviewed; *i.e.*, time of day/week; interview during work hours (avoid interviews on Friday afternoon or close to the end of the workday unless it is necessary to accommodate the person).

- Review the complainant and witnesses' personal file as soon as possible, preferably before the interview; get a feel for the person's value system, credibility, and prior employment history.

- Outline the questions and develop standard questions in advance of the interviews. On key questions, write them out and ask them the same way of each person. Avoid leading questions because they may lead to answers which reconfirm the investigator's preconceived views.

- Advise the witness of the degree to which you can keep the information in confidence. Generally, confidentiality can be maintained through the investigation, but confidentiality depends on state law.

- Consider not taking extensive notes during the initial stages of the interview. Listen to the whole story once, then go over it again for note-taking purposes.

- It is generally advisable to obtain a written statement from witnesses, if practicable. In so doing, whether written by the witness him or herself or transcribed by the investigator, the following matters should be considered:

  — Concentrate on the facts, and avoid conclusions.

  — Statements should be prepared in the context of the first person, *e.g.*, "I saw, and he asked me to . . . . He gave me . . . ."

  — Write out the narrative for signature by the witnesses. It is sometimes effective to ask the witnesses to write out a narrative in advance of the interview, then review it with them. Also, with minors who are capable, it is very helpful to have them write out, date, and sign their own statement. This technique not only assures that witnesses will be available to testify and have their recollection refreshed as to what happened later, but also avoids allegations that the interviewer "put words in their mouths."

  — When a statement by a witness is to be signed, ask the person to read the statement, then confirm accuracy by asking such questions as: "Is this pretty much what you said?" "Anything you would like to add or change?"

  — Get the statement signed and notarized, if possible. If the person refuses to sign, make a note that the witness refused.

  — If one wishes to make the statement an affidavit, include a verification, *e.g.*, "Based upon my personal knowledge, the above facts are true and correct." *(See* the sworn affidavit specimen form and discussion at page 13.)

  — Have someone witness that the statement was taken and signed. This avoids later allegations that the person was coerced to sign, that the signature was forged, or that the interviewer put words in the person's mouth.

- Be sure the witness has a person of the same sex to complain to in sexually-related cases, especially when claims of sexual harassment or alleged sexual abuse are involved.

- In most cases and especially with minors, it is prudent to have a person of the same sex as the witness present if the interviewer is of the opposite sex. This is especially desirable in sex-related cases.

Special Considerations in Interviewing Minors

- Check your state statutes and court rules about the competency of minors as witnesses.

- Consider securing the assistance of a child psychologist or a person trained in interviewing children to prepare the investigator for the interview or to participate in the interview of a child.

- Use a vocabulary which the child can understand.

- A child's concept of time is different. Use relations in time to holidays, events, and birthdays to identify time periods.

- Generally, one should obtain parental consent before interviewing young children. The older the child, the less parental involvement is necessary. Consideration should be given to having the child's parents present at the interview. If the parent is not implicated in the complaint, it is normally desirable to offer the parent the opportunity to be present during any questioning.

- Involve professionals, including child psychologists, social workers, and counselors when necessary to develop the facts.

Confronting the Accused

In many investigations of individual wrongdoing, it is best to interview the accused last. This is especially true when the accused might exert pressure on others not to testify or when the accused may destroy evidence. After interviewing other fact witnesses, the investigator will be able to follow up with questions to rebut, explain, or refute statements by the accused which seem inconsistent, inaccurate, or incomplete. As some investigators put it, you want to be "loaded for bear." This strategy is similar to that used by attorneys in taking the deposition of the key party in the case. There is no substitute for being thoroughly prepared with as many facts as possible.

The following guidelines should be observed:

- Plan the interview in advance. Like other interviews, the interviewer should outline or write out the questions or list the topics he or she will want to ask. This plan should not be so rigid that the investigator will risk losing spontaneity or being able to follow up with questions. The investigation plan and outline should serve as a checklist to assure that the investigator covered everything desired.

- Complete as much of the investigation as possible beforehand. Organize and review all the evidence obtained to date.

- Identify the key facts which require explanation.

- Consider the time, place, and tone of the interview and the psychological dynamics.[11]

- Review the personnel file in advance. This helps evaluate a witness' penchant for truthfulness, identify previous or similar problems, and potential penalty if the investigation results in a finding of guilt.

- Identify the applicable policies or rules involved in the complaint to determine what conduct may involve a violation.

- Determine before the interview what the philosophy of the school district

is in regard to pursuing any available criminal charges against an employee.

- Once a time and place has been selected, notify the employee (one or two days in advance) through his or her supervisor of the time, place, and purpose of the interview.

- Consider allowing the accused to have a "representative" present at the interview, especially when the allegations, if true, could result in termination. Typically the representative will be another employee, a union representative, or an attorney. Employers in most states are not required to allow the accused to have an attorney present in administrative, employment investigations, as distinct from disciplinary hearings. Where the accused insists, however, it may be best not to make a big issue of it. Rather, allow the attorney to be present and arrange for the school's counsel to be present as well. The role of the employee's representative is covered in more detail later in this monograph. Suffice it to say here that his or her presence can help preserve fairness and the overall appearance of fairness in the process. Representatives present at such meetings should not be permitted to argue, cross-examine the investigator, confront, interfere, or respond for the accused. Failure to observe these reasonable requirements can justify excusing the representative or limiting his or her role to strictly that of an observer.

- Avoid making decisions of guilt or what penalty might be applicable during the interview unless there is an admission by the employee.

- Ensure that responses are voluntary and the procedure and general atmosphere appear fair if challenged and reviewed later by the board of education, court, jury, or hearing officer.

- The interviewer must control his or her emotions; be courteous; avoid arguments; and not get angry. The tone of the interview must be investigative, designed to discover. The tone should not be punitive, coercive, or adversarial.

- The investigator should never make promises or representations that he or she can, will, or will not do something that cannot be delivered.

- Avoid giving advice to the accused on what he or she should do.

- Avoid making threats or giving an ultimatum. The investigator may and should, however, set deadlines and disclose what will happen next.

- Do not be "cagey." Let the accused know the purpose of the meeting, what the charges or suspicions are, the evidence of the alleged wrongdoing, that investigation may result in disciplinary action, and (where appropriate) that the school district may be required to turn over information to police.

- Do not physically prevent the accused from leaving the interview. (Employment consequences, however, may flow from the accused's failure to cooperate.)

- Have a range of options ready for discontinuing the employment relationship and the authority to propose them to the accused. This interview may result in admissions of the wrongdoing, and the only remaining issue will become the ultimate penalty or disposition of the employment relationship.

- If the employee is not on leave at the time, consider whether placing the accused on administrative leave is necessary during the completion of

the investigation and until disposition. Ascertain who has authority to implement and direct such leave.

- Preserve the opportunity for the person to maintain his or her personal dignity.

The Sworn Affidavit and the Fifth Amendment

As a part of a school district's investigation of alleged wrongdoings by an employee, the administration may require employees to answer questions, under oath, regarding the matter in question. Such an investigation technique is supported by law so long as two conditions are met: first, the questions asked must be specifically, directly, and narrowly related to the issue being investigated and relevant to the individual's duties, and second, any sworn statement given by an employee may not be used against that employee in any subsequent criminal prosecution. Under most state laws, any employee who refuses to answer work-related investigation questions or to give a sworn statement under the terms and conditions ordered by authorized school officials may be disciplined or dismissed.

Numerous court decisions, including ones issued by the United States Supreme Court and the Fifth Circuit, form the legal basis for the use of sworn affidavits in investigation of alleged wrongdoing. The United States Supreme Court has held that, given adequate immunity, the state may insist that employees either answer questions under oath about the performance of their job or suffer loss of employment. *Lefkowitz v. Turley,* 414 U.S. 70, 94 S. Ct. 316 (1973). Public employees may constitutionally be discharged for refusing to answer even potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity. *Lefkowitz v. Cunningham,* 431 U.S. 801 (1977); *Gardner v. Broderick,* 392 U.S. 273 (1968); *Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982), *reh'g denied,* 685 F.2d 157 (5th Cir. 1982), *cert. denied,* 459 U.S. 1206 (1983); *see also DeLurg v. Kretchmer,* 322 N.Y.S.2d 517, 519 (Sup. Ct. 1971), "A public employee, who is suspected of violating the public trust, cannot remain both silent and immune from disciplinary action or dismissal." Such questions may be asked of the employee so long as the questions are specifically, directly, and narrowly related to the performance of the individual in his or her duties. *Gardner, supra; Uniformed Sanitation Men Assoc. v. Commissioner of Sanitation of the City of New York,* 392 U.S. 280 (1968). Public employees in a limited and ever-decreasing number of states may be asked to submit to a polygraph examination as part of an investigation of alleged wrongdoing. *See, e.g., Hester v. City of Milledgeville,* 777 F.2d 1492 (11th Cir. 1985); and discussion at page 15.

In fact, the U.S. Supreme Court has held that an accused employee's silence can be used as evidence of guilt. *See Baxter v. Palmigiano,* 425 U.S. 308 (1976). The Court in *Baxter* stated the principle broadly: "The Fifth Amendment does not bar an adverse inference 'where the privilege is claimed by a party to a civil cause'." *Arthurs v. Stern,* 560 F.2d 477 (1st Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978), *citing Baxter,* 425 U.S. at 318. Additionally, courts have held that when an employee is subject to criminal prosecution, he or she may not require that other administrative dismissal proceedings be delayed until the criminal case is completed. *See United States v. Kordel,* 397 U.S. 1 (1970), where the Supreme Court affirmed a denial of a stay of civil discovery based upon the significant public interest in protecting persons from mislabeled drugs even though no one in the drug company could respond without incriminating him or herself. The *Kordel* holding has been expanded to include disciplinary proceedings involving public employees and doctors when there is a strong public interest. *Arthurs, supra; Giamoa v. Illinois Civil Serv. Comm'n,* 411 N.E.2d 1110 (Ill. App. 1980); *Flickinger v. Commonwealth of Penn.,* 461 A.2d 336 (Penn. 1983); and *Rosenberg v. Board of Education of School District #1,* 710 P.2d 1095 (Colo. 1985).

In general, the law provides that the government as an employer has the authority to question its employees under oath concerning matters relevant to their employment. The government may dismiss or discipline an employee after proper proceedings if he or she refuses to answer such questions. Incriminating information obtained from such an examination is, of course, inadmissible in a subsequent criminal prosecution when proper objection is made in the criminal proceeding.

The affidavit form should be simple and easily understood. It normally opens with basic questions like those on Appendix C which set out the authority of the school to require answers to the questions and advise the employee that his or her answers are not given voluntarily but are required as a condition of continued employment. Only questions relevant to information necessary to the issues being investigated should be included to avoid infringing upon the privacy rights of employees.

Some school districts provide for the use of these affidavits by policy so the employers will know the technique has been approved by the board. Other districts like to have it in policy so there is no question about the investigator's authority to require answers to the affidavit as a condition of continued employment. Whether it should be in board policy involves policy and legal questions which should be examined on a local basis.

Accused Confronts Accuser

When one employee or patron of the school district has accused another employee of wrongdoing warranting an investigation, it is generally not advisable to have the accused confront the accuser during the early stages of the investigation process. Arranging such a confrontation forces the administrator to accept one version over the other at the initiation of the investigation and automatically puts the two employees or patron and employee in an adversarial posture. An accused employee has no constitutional right to confront an accuser during the investigation. This is not, however, generally the case at a subsequent hearing. Ordinarily, unless there are significant and substantial reasons to justify otherwise, it will be necessary for the person making the accusations to testify and be present at the hearing in order to be cross-examined by the person being accused.

There are instances, however, when a face-to-face meeting may be beneficial, and the timing of such a meeting may be important to its usefulness. In the less serious offenses, a face-to-face meeting immediately at or contemporaneously with the occurrence could end the matter then and there without further complication. Allowing the accused to confront the accuser will many times determine whether additional investigation is even necessary.

The Use of Tape Recorders or Court Reporters

If it is necessary to obtain sworn statements from witnesses, one may consider the use of a court reporter. Certified reporters are generally authorized to administer oaths and can take down word-for-word statements which can be transcribed into verbatim typewritten form later. While the use of such reporters is an option and perhaps an alternative to the sworn affidavit or sworn statement, the procedure can be perceived to be so formalistic that, as a practical matter, it will not be of much application in the school setting. Some also feel it is an unnecessary expense. A court reporter can be especially useful when a formal atmosphere is desired and when an attorney is handling the questioning.

Tape recorders have similar advantages and disadvantages. Generally, the more accurate account which can be obtained of statements, the better. So long as the person being interviewed is advised that he or she is being taped, tape recordings may be made of most conversations. However, the question of whether an investigator should tape record a meeting is a complex one. If the employee initiates the request or tapes the interview, then the investigator should also tape it. A record of the nature and setting of the interview should be made on the tape at the outset. For example, the investigator might say,

> "This is John Doe speaking. I am the supervisor of the accounting department of the _____ School District. Today's date is Tuesday, _____, 19__, and it is now _____ o'clock __.m. Present with me here in my office are _____ and _____. The purpose of this meeting is to discuss allegations that [state nature of investigation]. I am investigating the matter for the School District. Mr. [employee] has requested that the interview be tape recorded and is also making his own recording." If the District is initiating the request and has

obtained the employee's consent, the investigator might substitute: "In order to obtain and preserve an accurate account of this meeting, I have requested that a tape recording be made. Mr. [employee] has consented to that, and I have agreed to make the tape or a copy available to Mr. _____ should he request access to it in the future. Is that correct, Mr. _____? With that background, then let me begin. Mr. _____, you are currently employed by the _____ School District as _____. Is that correct? [Etc.]"

While it is not necessary that the supervisor obtain the consent of the employee to tape the interview, in all cases when it is determined to tape, the investigator should be certain that all persons present *know* that it is being taped. Taping by a school official without the knowledge of the other party creates an atmosphere of unfairness and oppression and may, in fact, be illegal in certain states.

Taping a meeting may add a feeling of formality and may even add a "chill" to the conference. This might thwart the objective of a free and open conversation about the facts. Tape recordings are more susceptible to mechanical failure. Also, despite the technological advancements with recorders, playing back a recording seems to sound impersonal and cold. A tape recording is certainly less personalized than a signed statement in the witness' own words or hand and is generally no substitute for personal, live testimony later. If a tape recording is made and is deemed to be a necessary element of evidence, it should be transcribed. A written transcript makes it much easier to focus on the relevant testimony. Since most interviews will involve having the supervisor and another person present who can take notes of the conversation, there is usually no need to tape it.

The Use of Polygraph Exams

For several years, the use of polygraph tests by employers was a standard practice, but many states have now begun to regulate or prohibit the use of such tests.[12] As of 1986, only six states did not regulate polygraph exams in any manner.[13] The United States Congress has itself adopted the "Employee Polygraph Protection Act of 1988." The rules implementing the Act are found at 29 C.F.R. Part 801 (December 27, 1988). This Act, however, specifically excludes public sector employees, such as school districts.

The widespread regulation of polygraphs reflects the recognized skepticism which exists concerning the reliability of polygraph exams and their true worth as an indicator of guilt or innocence. Polygraph examinations are considered unreliable, and in most states they are not admissible into evidence in a court proceeding. Forcing employees to take polygraphs, even though legal in some jurisdictions, is not likely to be well received by a reviewing agency, court, or jury. Therefore, even in those states which have no statutes governing the use of polygraphs, an employer must employ such methods carefully and with great sensitivity.

In situations where the stories of the accuser and the accused are vastly different, the use of polygraph examinations for all concerned parties may be considered. Normally, polygraphs are offered to employees as a means of helping establish one's innocence rather than proving guilt. If the investigator cannot determine which party, the accused or the accuser, is telling the truth, both can be offered the option of taking a polygraph which is controlled and paid for by the school district. Polygraph results are too easily manipulated, so care must be taken by the school to control the areas to be questioned and the conditions under which polygraph examinations are to be given. If the school wishes to control the situation, the school must be willing to assume the cost of the examination.

Accordingly, when polygraph testing is considered, the employer must be aware of the legal risks associated with their use. The following factors should be considered carefully:

- Is the use of the polygraph absolutely necessary? Would a sworn affidavit or the use of another investigatory technique achieve the same results?

- If a polygraph is deemed necessary, current state laws should be examined and *strictly* followed.

- A release from the employee to be tested should be secured, but it should not waive the employee's rights against self-incrimination in a criminal proceeding as protected by the Fifth Amendment.

- Only those employees necessary for a complete investigation should be given a polygraph. The employees who take the test should be informed in writing that the request carries no accusations.

- Employees with known nervous or mental conditions should not be tested. The examiner should be instructed to stop the examination if the employee becomes emotionally upset.

- The questions should not invade personal privacy interests and should only involve information absolutely necessary to the investigation.

- Test results should be discussed only with those employees who absolutely need to know.

- Treat all employees whose responses indicate a variation from the truth uniformly. It must be decided whether such results will be considered conclusive or merely probable evidence of guilt or innocence.

As this discussion demonstrates, the use of polygraph tests is fraught with problems in methodology, administration, and results. Accordingly, the need to use a polygraph test should be especially compelling in order to negate the formidable drawbacks inherent in the tests.

Privacy Rights and Confidentiality

Public disclosure of private facts can constitute an invasion of privacy. Therefore, throughout the investigation, school administrators should strive to protect the privacy rights of the employee and attempt to maintain the confidentiality of the investigation and its results, as it is being conducted and for the future. Privacy rights can be protected by posing questions to employees during the investigation which are narrowly drawn and elicit only that information necessary to the furtherance of the investigation. Additionally, the investigation itself should be limited to job performance and effectiveness. The questions asked should have a nexus to the issues being investigated. The questioner should have basic questions already formulated to prevent the careless posing of an irrelevant, intrusive question. Also, the investigator should be careful not to make off-hand comments concerning the employee's responses or personal characteristics of the employee such as age, sex, religion, etc.

Aside from the importance of protecting the employee's privacy rights, administrators must strive to keep the investigation and its results confidential. As mentioned earlier, just because an administrator labels a document *CONFIDENTIAL* does not necessarily mean that it will be protected from disclosure. Accordingly, administrators should familiarize themselves with their state's open records law, if one exists, to determine what categories of documents are or are not protected from disclosure. Another option is to have the most sensitive documents prepared under the direction of the school district's attorney. In most states, the attorney can shield the documents as work product or can invoke the attorney-client privilege on behalf of the district. Rather than devising ways to totally protect a document, administrators can lessen the potential for liability in the event of disclosure by carefully preparing all documents in a straightforward, *factual* manner. An administrator should scrupulously refrain from including any personal comments or conclusions in any investigatory materials which are subject to possible disclosure.

Different issues arise when the suspected employee requests a copy of all internal notes or statements accumulated during an investigation. Providing such documents can cause many problems, including disruption of inter-employee relations when it is revealed who made the accusations or provided information tending to support the accusations. A more serious problem is the chilling of cooperation by employees in subsequent investigations if it is known that the identity of all complainants will be routinely revealed. These concerns have led at least one court to protect the disclosure of such information. In

explaining the policy behind protecting investigative documents, the Colorado Court of Appeals stated:

> The rationale for this exception is dual in nature. Not only does it encourage cooperation on the part of those who may not be required to provide information to a governmental agency, but it also protects the rights of those who are required to provide such information.

Freedom Newspapers, Inc. v. Denver and Rio Grande Western R.R. Co., 731 P.2d 740, 743 (Colo. App. 1986).

This policy argument must, of course, fall in the face of a court subpoena or the clear language of a state open records law. However, some state open records laws provide for nondisclosure when it would be contrary to the "public interest" or when its disclosure would "clearly constitute an invasion of personal privacy." A statement of allegations written by a student may be protected from disclosure under the Family Educational Rights and Privacy Act of 1974 because disclosure would reveal a student record not subject to disclosure. Some states' open records acts also recognize an exception to disclosure for the protection of the victims of certain crimes.

Searches and Drug Testing

Traditional Searches

As stated earlier, the Supreme Court has resisted applying criminal law standards in the context of investigating employee misconduct. This resistance was clearly demonstrated in *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987). *O'Connor* involved the search of the office of a psychiatrist employed by a state hospital. The Court recognized that "[i]n the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." 107 S. Ct. at 1499.

Citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), which adopted a "reasonable suspicion" standard for student searches in the school setting, the Court held that, "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." 107 S. Ct. at 1502. Reasonableness of a search is measured by two factors. First, the search must have been justified at its inception. Second, the search as actually conducted must be reasonably related in scope to the circumstances which were the basis of the search in the first place. *Id.*

Despite the permissive language contained in *O'Connor*, it was a plurality decision and a school administrator must recognize that sometimes conducting a search can cause more problems than it can solve. Most searches should be conducted by the school administrator in the presence of the suspected employee and an independent witness such as someone from the personnel department. Generally, it is not advisable to have a peer employee serve as a witness for it tends to put two co-workers in an adversarial position and may also result in the disclosure of private facts which the worker will not hold confidential. The school administrator should approach the suspected employee in a nonthreatening manner and ask for permission to search his or her desk, locker, etc. If permission is granted and nothing is found, the administrator should apologize for the necessity of the intrusion. When the employee refuses to give permission, the administrator should explain that it is his or her obligation and duty to conduct a search to remove any suspicions about the employee and to protect the integrity of the school. The search should then proceed in as much privacy as can be secured.

Care should be taken that the requirements of *O'Connor* are met before proceeding with a search. Secretive, late night, or clandestine searches should be avoided completely unless carried out under the direction of law enforcement officials who are working pursuant to a search warrant. The use of surreptitious search methods will likely be perceived as unfair and may cause distrust by employee groups. If something is found, the focus may nevertheless shift to the methods used instead of the results. A face-to-face confrontation and search in the presence of an employee will better promote the goal of overall fairness and preserving the dignity of the worker.

If the search could produce evidence of a crime, an administrator should also consider the interests of the local district attorney and other law enforcement agencies before making the search. Incriminating evidence obtained in a search conducted by an employer may be excluded in a criminal proceeding against the employee. Therefore, if the preliminary evidence strongly suggests that a crime could have been committed, school officials may want to consult with the district attorney or law enforcement officers before conducting a search. This is an important consideration, for if the police decide to conduct a search with a warrant, two potential problems are solved. First, the employer is no longer the "bad guy" in the employees' eyes and the chances of civil liability are substantially reduced. Second, school officials do not run the risk of spoiling a case for the district attorney or the police. A negative to the police search is that, except in exigent circumstances, a warrant is required and "probable cause" rather than "reasonable cause" is the standard necessary to obtain the warrant.

Another point of caution for administrators is the location of the search. Absent the employee's consent, searches by employers are permissible only in the work environment. Accordingly, the authority to conduct a search does not extend to the employee's home or other areas outside the environment controlled by the school. This is true even when the search is for school property. Therefore, any desire to search areas not controlled by the school must be satisfied through police involvement and the use of search warrants.

Drug Testing as a Search

Another volatile issue related to searches is the question of drug testing. Testing for the presence of drugs, either through urinalysis or blood testing, is a search subject to the protection of the Fourth Amendment. *National Treasury Employees Union v. Von Raab,* 109 S. Ct. 1384 (1989); and *Skinner v. Railway Labor Executives' Assn.,* 109 S. Ct. 1402 (1989). The Fourth Amendment prohibits only unreasonable searches, and as *National Treasury Employees Union* and *Skinner* illustrate, where the governmental interest is compelling enough, the government may require drug testing of its employees.

In *Von Raab,* the Court held that the Customs Service had a sufficiently strong governmental interest in testing employees who were seeking transfers or promotions to positions having a direct involvement with drug interdiction or requiring the person to handle firearms or classified materials. This interest overcame the employee's right to be free from a search. The same was true in *Skinner* where the Federal Railroad Administration demonstrated the requisite governmental interest to administer drug and alcohol tests to employees who were involved in certain accidents. The compelling governmental interests served by the testing regulations outweighed the employees' privacy rights.

Many school districts are utilizing across-the-board drug testing for their bus drivers and the mechanics who work on the buses based upon the holdings of *Von Raab* and *Skinner.* In *Jones v. Jenkins,* 878 F.2d 1476 (D.C. Cir. 1989), the District of Columbia Court of Appeals upheld a testing program for the D.C. schools' bus drivers, mechanics, and bus attendants involved in the transportation of handicapped students. Whether this blanket approval for drug testing will be applied to other school employee groups depends upon the circumstances and the compelling nature of the need to test in the absence of individualized suspicion.

Random drug tests which are not predicated on reasonable individualized suspicion have not been approved by the courts. *See City of Palm Bay v. Bauman,* 475 So.2d 1322 (Fla. App. 5 Dist. 1985); *Capua v. City of Plainfield,* 643 F. Supp. 1507 (D.N.J. 1986); *Lovvorn v. City of Chattanooga,* 647 F. Supp. 875 (E.D. Tenn. 1986). Courts have, however, approved tests of specific individuals when there is individualized suspicion of an employment-related activity which would be revealed through the test. As set out more fully below, this standard is a flexible one that attempts to balance the government's rights as an employer and as a provider of services to the public against the individual's right to privacy.

In *Division 241 Amalgamated Transit Union v. Suscy,* 538 F.2d 1264 (7th Cir. 1976), a policy which required that urinalysis tests would be given to employees directly involved "in any serious accident" or those employees "suspected of being under the influence" of intoxicating liquor or narcotics was upheld. In *Turner v. Fraternal Order of Police,* 500 A.2d 1005 (D.C. App. 1985), a policy

upheld by the court provided that all members of the force may be ordered to submit to urinalysis if "suspected of drug use" by department officials. The court read the policy to require that there must be a reasonable objective basis to suspect that a urinalysis will produce evidence of an illegal drug use. In *McDonnel v. Hunter,* 612 F. Supp. 1122 (D. Iowa 1985), the court approved urinalysis testing "on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee has been under the influence of alcoholic beverages or controlled substances."

The reasonable suspicion requirement cannot be avoided by a school district making mandatory urinalysis a condition of employment. While a search conducted pursuant to voluntary consent does not violate the Fourth Amendment, *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), any consent form signed as a condition of employment cannot be construed to be a valid consent to any search other than one that is reasonable under the circumstances, thus, permissible under the Fourth Amendment. Public employees cannot be bound by unreasonable conditions of employment. *Pickering v. Board of Education,* 391 U.S. 563 (1968). Advance consent to future unreasonable searches has been found, by at least one court, not to be a reasonable condition of employment. *McDonnel v. Hunter, supra.*

Once the threshold reasonable suspicion issue is satisfied, the next concern is whether the drug testing program, even if properly justified in a specific case, bears a rational relationship to a legitimate government purpose. Given current technology, urinalysis tests cannot measure whether an individual who tests positive for the presence of drugs is actually under the influence of drugs at the time of testing. (A blood test for alcohol presents less of an issue in this regard.) As a result, some courts have found that the use of urinalysis tests as the sole basis for severe discipline of employees is not rationally related to a legitimate government purpose and thereby violates due process. In other words, unless the effects of drug or alcohol use are job-related, any adverse employment action taken on this basis might be challenged as lacking a rational tie to the government's interest. *Doe v. Hampton,* 566 F. Supp. 265 (D. D.C. 1977); *Merritt v. D.O.J.,* 6 M.S.P.B. 653 (1981) (off-duty use of marijuana does not possess a sufficient nexus to officers of the federal service to justify discharge).

In the policy attached as Appendix D, the required nexus is supplied in the definition of reasonable suspicion, which requires evidence which ties the drug or alcohol use to the workplace. This concern is also addressed by the policy statement in the regulation which sets out the school district's goal of a drug-free environment in the schools and the various interests that this policy will promote.

The next area of concern is the need to follow specific procedures relating to the administration of the test which meet due process requirements. These procedures should include the use of a testing technique that will be accurate and susceptible to confirmation, the utilization of a chain of custody to ensure that the possession of the sample from the employee from whom it was taken to the person administering the test is documented, and that samples are properly stored. A sample of the specimen must also be preserved for independent testing to protect the employee's right to due process. *Banks v. F.A.A.,* 687 F.2d 92 (5th Cir. 1982); *Brewer v. Motor Vehicle Dept.,* 720 P.2d 564 (Colo. 1986).

Moreover, and especially in situations where the employee has tenure or other contractual rights to continued employment, *i.e.,* where a property interest in his or her continuing employment is implicated, the termination of employment based on a "positive" test must be preceded by notice and opportunity for hearing appropriate to the nature of the case. Due process in this context requires that before the employee can be discharged on account of the urine test positive for drugs, some adversary process is in order to determine that (1) he or she is, in fact, the subject of a particular positive test and (2) that the positive test has been appropriately confirmed. *Jones v. McKenzie,* 628 F. Supp. 1500 (D. D.C. 1986). At a minimum, procedural rights must include adequate notice and an opportunity to contest any adverse action taken on the basis of test results. Negotiated agreements may require the application of additional procedural rights.

The final concern raised by such a policy is the effect of § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), which protects the employment rights of handicapped individuals in programs receiving federal government aid or assistance. The Rehabilitation Act defines handicapped indi-

viduals as any person who has a physical or mental impairment which substantially limits one or more of that person's major life activities. The definition of "handicapped individual," however, specifically excepts any individual who is an alcoholic or a drug user "whose *current* use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug use, would constitute a direct threat to property or the safety of others." 29 U.S.C. § 706(7)(B). [Emphasis supplied.]

In short, to be protected by the Rehabilitation Act, an employee must prove that he or she has a drug or alcohol dependency and is, therefore, handicapped but is not so handicapped that he or she cannot perform the job. Where an employee falls under the protection of the Rehabilitation Act, the Act prohibits an employer from discharging the employee if, after reasonable accommodation is made, the employee can adequately perform the job. The courts have not clearly defined the meaning of reasonable accommodation of an employee with a drug dependency, but it may require affirmative efforts to assist drug dependent employees toward overcoming their handicaps before firing them. *See Whitlock v. Donovan,* 598 F. Supp. 126 (D.D.C. 1984), *aff'd,* 790 F.2d 964 (D.C. Cir. 1986); *Walker v. Weinberger,* 600 F. Supp. 757 (D.D.C. 1985) (alcohol cases). It does not appear, however, that reasonable accommodation requires a school district to continue an employee when it impairs the employee's ability to perform his or her job or when the use of the drugs or alcohol would pose a direct threat to the safety of children.

School administrators should consider the limitations imposed by § 504 upon any disciplinary measures that might be considered after positive test results are obtained. Additionally, a school district should carefully consider for whom they will offer an opportunity for rehabilitation and what form this opportunity will take.

Informants or Undercover Agents

As with other investigative techniques, it is important to review the considerations discussed at page 3 to determine if the use of an informant is the preferable technique under the circumstances. If possible criminal activity is involved, it is usually advisable to consider involving the police officials or the district attorney from the beginning. Involvement of the authorities has its advantages and disadvantages.

Advantages:

- The school district eliminates the possibility of ruining the chances for the prosecutor to obtain evidence in a form which can lead to a criminal conviction.

- The local police authorities have more resources and expertise in the handling of such matters than do school authorities, and the community is less likely to feel there is a cover-up of wrongdoing by school officials.

- If undercover agents are going to be involved in drug purchases, police involvement is essential. In most states the purchase of drugs by school employees or private investigators not associated with the police would be committing a crime.

Disadvantages:

- The involvement of local police authorities can appear to be heavy-handed and overreactive, especially if the suspected employee is exonerated. This can then cause employee relations problems.

- School officials are likely to lose control over the investigation process once the authorities become involved.

- Obtaining evidence for use in a criminal prosecution is shrouded with constitutional protections. Therefore, the local police authorities may have to proceed more cautiously and for longer periods of time before any action may be taken.

- Oftentimes the police may not make the evidence they secure in their investigation available to the school authorities for employment-related action for fear of damaging their criminal case.

These pros and cons, as well as others, of police involvement should be considered while making the decision whether to use informants or undercover agents.

Suspension With or Without Pay (Administrative Leave)

The first question an administrator must consider before suspending an employee is whether he or she has been delegated the authority to suspend under school district policies and regulations. If the administrator is not sure he or she has that authority, it is vital that the administration obtain the authority by board action or through a board policy or procedure or a negotiated agreement before taking action concerning an employee.

Once a decision to suspend has been made and the authority is established, the administrator should arrange a meeting with the accused employee. Normally it is desirable to include a third person who will maintain the confidentiality of the meeting. If possible, the meeting should take place early in the day near the beginning of the week. This provides the suspended employee an opportunity to have any questions answered during the workday and keeps the school in control of that employee's access to other employees whose recollections or safety might be affected by the suspended employee. Suspensions on Friday afternoons should be avoided. The suspension should be handled with as little fanfare as possible and the employee should not be embarrassed or demeaned.

Although it is not technically required by due process in the view of courts which have considered it, many find it advisable to afford the rudimentary due process procedures outlined in *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985), prior to placing the employee on administrative leave. *Loudermill* provides that an employee is entitled to (1) oral or written notice of the charges against him, (2) an explanation of the employer's evidence, and (3) an opportunity for the accused to present his or her side of the story. The requirements of *Loudermill* can easily be satisfied in the meeting informing the employee of his or her suspension. The employee should also be given a letter outlining the substance of the meeting. Appendix E is a sample of this post-meeting letter. While the employee may be told he or she will be suspended at the meeting, this letter should not be prepared and presented to the employer until after the meeting.

During the meeting and in the letter the employee will receive it may help to not call the action being taken a "suspension." In fact, many school districts feel that the term "administrative leave" accomplishes the same objectives as a suspension without the harshness or adverse connotation of calling it a suspension. Instead, it may be preferable at the early stages to simply tell the employee to take a few days off and consider it as leave with pay of some sort without describing it as such. Calling this personal leave, leave with pay, etc., may achieve the same results but better preserve the employee's dignity until a determination is made whether a more formal, time-consuming investigation will be warranted. Whatever action is taken should, of course, be taken in accordance with state law and school board policy.

As indicated in the sample administrative leave letter, it may be necessary to advise the employee of his or her expected behavior during the administrative leave period. School officials do not want the employee harassing other employees or disrupting the educational process. Accordingly, it may be appropriate to instruct the employee to remain off school grounds at all times during the administrative leave. This is complicated, of course, if the employee has a child attending the school. The employee may be involved as a parent in sporting and other events at the school after hours. An administrator must recognize that the employee has a right to participate as a parent. The employee may also be instructed to report to or be available either in person or by phone during the administrative leave period. Some state laws, board policies, and collective bargaining agreements permit the school district to reassign an employee to other duties during the suspension or administrative leave. When this is legally permissible, school administrators can often assign the individual to other duties and avoid the criticism that the employee is being paid for not working.

Once an employee is placed on administrative leave, the media will many times begin inquiring into the reasons for the suspension. Media relations are discussed at page 26. Generally, if an administrator feels he or she has sufficient evidence to justify placing the employee on adminis-

trative leave, then it is probably acceptable to tell a reporter that the employee has been placed on leave. But it is very important to follow up with the reporter with appropriate statements as the facts are revealed in the investigation. This follow-up is just as, or more important, when the employee is exonerated as when the charges prove true. Care must be taken not to implicate a liberty interest or violate the employee's civil rights by making accusatory statements about the facts involved in the allegations or the investigation. Unsubstantiated charges, made public, could also result in a possible slander or libel action being made against the district and its administrators.

It is also important to respect the suspended employee's rights to personal property while on suspension. Removing the employee's personal items from his or her office or locker may appear to be an overreaction, at least at the initial stages of the investigation. The administrator must, however, also guard against actual or claimed theft of the suspended employee's belongings or of removing personal effects which could damage the employee's ability to defend him or herself. Therefore, it may be advisable to ask the employee to remove his or her personal items for protection and to guard against accusations by the employee of theft or non-consensual searches by the school administrator. If the employee is asked to remove his or her personal property, it is advisable to have it done at a time and in a manner to avoid embarrassment to the employee. It is also advisable to have a third party witness the removal and prepare a list of the items removed. This list should be signed by the employee, the administrator, and the third-party witness. Appendix F is an example of a list for property removed by the employee.

RELATIONSHIP WITH OUTSIDE AGENCIES

The investigation of wrongdoing in the school setting does not occur in a vacuum. School officials should be aware that there are outside agencies which can lend assistance or which must be involved in the investigation. These agencies can include law enforcement agencies such as the local police, the district attorney's office, or other state and federal agencies.

Law Enforcement Agencies

Before the need for investigation arises, school districts should attempt to get an understanding or protocol worked out with local law enforcement officials. This may include city, county, and state law enforcement offices. Also, the district should identify those persons in the school district who will act as the liaison with these agencies and have them establish a relationship with the contact person(s) in each agency. Many school districts establish relationships with police agencies at the individual schools as well as at the central office level.

It is important to remember that relations with law enforcement agencies are a two-way street. There may be situations where the police have all the evidence establishing the criminal conduct of a school employee. Unless a working relationship has been established, the school district might find itself in the frustrating situation of not being able to take employment action when the police have filed criminal charges.

The establishment of a working relationship with the police does not mean that the police should be involved in all investigations of employee misconduct. However, some guidelines should be developed concerning when matters should be reported and how work-related allegations may be jointly investigated.

Other Agencies and Sources of Information

Just as it is important for a school district to establish a liaison with the police, it may also be helpful to establish a similar working relationship with the district attorney, the United States Attorney, the Equal Employment Opportunity Commission, Office for Civil Rights, and other vital governmental agencies. Many of these agencies have independent investigative powers which can be utilized in the more serious cases and may be an invaluable source of information and guidance to school authorities.

In addition to these agencies, there are independent sources of information available to a school district during the investigation of a serious allegation, especially where the work history or credibility of the individual is important. For instance, a district might file a request for information from an agency through the state's open

records law. On the federal level, the Freedom of Information Act (5 U.S.C. §§ 552 *et seq.)* provides access to information gathered and maintained by federal agencies. Other sources include the state's Department of Motor Vehicles, which will usually give records of any prior tickets or accidents, the state bureau of investigation, and worker's compensation offices, which can give records indicating whether the employee has worked elsewhere and has filed claims. Also, unemployment records can provide some information on an employee's work history. Generally, the more relevant information an investigator has about someone, the better off he or she is in making a judgment about the employee's credibility during an investigation. Such information can also help determine the appropriate action to take once the investigation is complete.

MAKING THE DECISION

Preliminary Decision

Once the initial investigation is completed, the appropriate administrator must make a preliminary determination of what action to take before a final meeting with the accused. Even if the charges proved groundless, it is imperative that school administrators meet with the accused, review the investigation, and the results. Remember, documenting this can be as important in the situation where the employee is innocent as when he or she is guilty.

In reaching the preliminary decision, there is a checklist of factors which should be considered carefully before proceeding:

- Is the investigation complete, and have the established procedures been followed throughout?
- What are the established, material facts?
- Did the alleged misconduct occur while the employee was on duty, off duty, or at or away from the workplace? If the alleged misconduct did not occur at school or a school-related activity, how is the misconduct related to the school and the employee's job?
- Does "just cause" for discipline exist, and, if so, how can it be described? For example, what behavior standards, rules, policies or laws were broken? What is the evidence and proof supporting a finding that the misconduct occurred?
- How serious was the infraction? Also, how directly and significantly did the misconduct affect the school district and its operations?
- What is the range of penalties or disciplinary action available? Is progressive discipline applicable or required under the circumstances?
- What is the employee's past record? Is this the first or subsequent occurrence?
- Is there a chance that the misconduct can be remediated, and is the employee entitled to try? [The reasons for either decision should be reasonable and defensible to an arbitrator or judge.]
- What has been the district's disciplinary practice in the past with similar cases? What is the district's philosophy about this kind of case?
- What will be the effect of a decision on other employees? What effect will the decision have on labor peace, and will the decision deter future acts?
- Are there any mitigating circumstances which should influence the decision?
- Has the accused been treated in a manner that the person conducting the investigation would expect to be treated if he or she was in the same or similar situation?

Once these factors have been considered, the administrator is ready to proceed with the final meeting with the accused.

Meeting with the Accused

One frequent mistake school administrators make is to prepare a post-meeting letter to the accused *before* the final meeting. While it is usually helpful to have an outline to follow in the meeting, this final meeting is an opportunity for the accused to explain, discount, or totally discredit any damaging evidence gathered during the investigation. Consequently, the administrator must be open to any explanations by the accused, and any explanation or evidence offered by the accused should be weighed with the other evidence.

Once the final meeting has occurred, the administrator should follow up with a written letter or memorandum. These letters or memoranda generally follow the same format and include five major sections:

- The opening section should explain the nature and substance of the charges and describe with some specificity the evidence supporting the enumerated charges.

- The second section should relate how the employee responded to the charges throughout the investigation and in the final meeting.

- The following section should state that based upon the investigation, the evidence obtained, and the response of the employee, the following conclusions have been reached. The section should then set out separately the various conclusions reached and the decision.

- The fourth section basically answers the question, "What happens now?" One possibility is that the employee will be proposed for discharge. The basis for such action should be explained, i.e., serious misconduct, progressive discipline not applicable to such a serious infraction, second, or third such incident, etc. If the employee is to be retained, but his or her behavior contributed to the problem, it is advisable that appropriate directives be given in the memoranda. For example, a male teacher should be instructed that his decision to drive two female students in his car was an exercise of poor judgment and that he should not do it again. The teacher should then be instructed to never replicate such behavior unless a female teacher accompanies him and the female students. A subsequent violation of such a specific directive can provide an independent basis for discipline or discharge based upon failure to follow directives.

- The final section should instruct the employee that if everything stated in the letter is not clear, the employee should contact the administrator in writing within a time certain. It is vitally important that "closure" be achieved, that is, that both parties completely understand the results of the investigation, the position of the parties, and any directives given. Closure is greatly facilitated by the careful drafting of a detailed post-meeting letter.[14] Appendix G is a sample post-meeting letter where wrongdoing was found, a determination made not to proceed with termination, but giving directives concerning future behavior. Appendix G can be adapted to advise the employee that a recommendation for termination will be made. Appendix H is a post-meeting memorandum citing a lack of evidence of wrongdoing.

As a side note to the post-closing letter, it is important that the administrator document receipt of the letter by the employee. This can be accomplished through hand delivery with the employee signing a duplicate or through certified mail. Normally, it is desirable to hand deliver the memorandum because that adds a personal touch and shows an interest and concern. If the employee refuses to acknowledge receipt of the letter, one can simply have an independent third party sign that the employee received a copy with a note made of the date and time.

Confessions

Once an investigation is under way or is imminent, some suspected employees will give in to the pressure and confess. A confession makes an investigator's job easier, but it does not necessarily end the inquiry. A confession must be able to withstand attempts by the employee to recant and sustain subsequent attacks in dismissal proceedings or possibly in court. Therefore, the following guidelines are suggested:

- If possible, a witness should be present during the confession. Should the employee confess when a third party is not present, consideration should be given to calling in a third party and having the employee repeat the confession.

- Although it is not essential to have the confession in writing, a written confession can prevent later proof problems. Written confessions are always better if they are in the employee's handwriting. The employee should be asked to review the confession and make any necessary changes before signing it.

- If possible, the school official should "make a record" at the beginning of a confession. It is desirable that the atmosphere in which the confession is made be recreated with a description of the time, location, and circumstances surrounding the employee's decision to confess. The employee can be asked questions such as, "Are you making this statement today of your own volition or have you been threatened or forced to make the statement?"

Conditions are not always such that these guidelines can be followed. Nevertheless, the less one has to depend on verbal statements and admissions in the employee relations process, the better. A written admission in the employee's handwriting witnessed by a third party in a nonthreatening environment is always better than a verbal confession made late in the evening in the supervisor's office with only the supervisor present.

THE ROLE OF THE EMPLOYEE REPRESENTATIVE

The question of whether the employee should have a representative present at any time during the investigation, and, if so, when and what should be his or her role is present in each investigation. State laws, state court decisions, board policies, and collective bargaining agreements are the best sources for an answer. Unlike the rights of an accused in a criminal setting, the presence of a representative in the school's investigatory process is not required by the United States Constitution or federal laws.[15]

If state laws do not dictate whether an accused employee is entitled to representation, then school authorities should utilize common sense in the circumstances. There is no right or wrong approach because so many factors affect the response. Factors such as the seriousness of the alleged offense, the possible consequences on employment, the relationship of the school authorities with the representative, the strength of the investigator, and the interest of other employees and the public in the investigation should be considered. For example, a strong investigator who is firmly in control of the investigation would probably not be threatened or impeded by the presence of a representative, especially if the representative role is one of observation and not active participation. The representative may actually be helpful in assisting the employee in understanding the seriousness of the allegations or the nature of the evidence supporting the allegations. On the other hand, an unsure investigator, not in control or being threatened by employee groups, may not be capable of handling the presence of a loud and demanding representative who asserts the right to speak for the employee.

In the absence of laws, policies, or bargaining agreements which dictate whether a representative can be present and define that person's role, there is an approach which many administrators have found permits the investigation to proceed while assuring a substantial degree of protection to the employee. This approach assumes that, at any point in the investigation, the employee may have a representative present. The role of the representative in these meetings is a limited one. The

investigation should not be delayed because the representative cannot be present when the investigator wants to meet with the employee, and the employer is not required to meet or confer only with the representative or to negotiate with him or her. The representative should serve as an observer and not an active participant. The conversations should be between the investigator and the employee. The employer may insist upon hearing the employee's own account of the matter.[16] The representative should be present to observe, assist the employee, clarify the facts, and help ensure fair treatment, but should be asked to leave if he or she interferes with the fact gathering process. This role and the ground rules for the representative's presence should be made known to the employee and his or her representative when the employee first asks for his or her representative to be present. Some districts set this process out in administrative guidelines, but others find that this is not necessary. Whenever a representative is present at a meeting, the investigator should, of course, have another person present.

Many school administrators refuse to allow a representative to be present, and, if not required by law, policy, or agreement to do so, there is no requirement that they allow a representative to attend. Circumstances when this administrator might consider an exception are when the evidence is strong or overwhelming that the employee is guilty of the alleged misconduct or where it is likely that some action affecting the employee's employment status will be taken at the meeting, such as administrative leave pending further investigation. The presence of a representative at a meeting where the administrator confronts the employee with the allegation and the evidence can often prove helpful in having the employee understand the seriousness of his or her status. Many times, an employee refuses to believe the worst and a third party can be helpful in the employee's understanding the seriousness of the situation and may encourage the person to seek a resolution short of being involuntarily terminated. Some administrators even suggest that employees seriously consider bringing an attorney or representative to a meeting where the employee is going to be confronted with significant evidence of wrongdoing which could lead to involuntary termination.

MEDIA RELATIONS

Contact with the media, especially regarding employee misconduct, has the potential of making a bad situation worse. Inquiry by the media should be anticipated and planned to prevent the making of inappropriate statements by a school official. The following are a few simple guidelines which should be considered:

- Answer all questions honestly. The obligation, however, is to be truthful, not to tell everything one knows. If asked a sensitive question about the person or the investigation, one should not be afraid to say, "I am not in a position to respond to that" or "In order to preserve the rights of all concerned, it would be inappropriate for me to speak to that at this point in the investigation," but never lie. Avoid saying "no comment" because this answer gives the impression that one has something to hide or it can give the appearance of affirming a question. Some alternative responses regarded as more neutral include: "I cannot even accept the question," "I cannot either affirm or deny the question," or simply, "I cannot answer that question." Attorneys representing a school district can usually decline to answer sensitive questions based upon the state's Code of Professional Responsibility or Disciplinary Rules for Attorneys.

- When the investigation centers on the allegation of a child and children are involved in responding to the media, school officials must be sensitive to not releasing or speaking from student records in violation of the Family Educational Rights and Privacy Act (FERPA). Many times the media do not understand the constraints imposed by FERPA, and school officials will need to inform the media of FERPA's restrictions. Similar constraints exist in various states regarding the release of certain employee records.

- One must make certain to fully understand the question asked before attempting to respond. If one does not understand the question, clarification should be requested.

- One should answer the reporter's questions as fully as possible, however, this does not necessarily mean that one should volunteer more than is requested. It helps to ask questions of the reporter to make certain he or she understands the answer.

- If one does not know the answer to a reporter's question, the reporter should be told that it will be necessary to check with others to determine the answer and that the reporter will be contacted to be given the answer. Any promised follow-up must be fulfilled.

- One must assume that *everything* said to a reporter is on the record and can be used in an article or news story.

- Phone calls from reporters should be returned even if the response to questions will be that nothing can be said on the subject.

- One must always give the same answer (unless circumstances have changed) to different reporters. If circumstances have changed, one should consider contacting the reporter to whom one spoke earlier and give that reporter the updated information.

- One should anticipate an interview and prepare for it. Review the facts and background materials and determine how one will answer sensitive questions. It is sometimes helpful to prepare a paragraph response to anticipated questions in advance of the interview.

- One should always attempt to respond with short, direct answers.

- One should never speculate or go beyond the facts known. Do not fall into the trap of "what if" questions because those are not fair inquiries.

- Be proactive. Many times school officials can take negative implications and speculation out of the story by initiating the information release to the press themselves.

CONCLUSION

The application of legal standards in schools reflects the school's unique position in our society and the mission of educating young people. So long as the investigation of alleged wrongdoing by employees is school-related as compared to investigations seeking evidence of criminal wrongdoing, the relaxed standards of reasonable cause are applicable. While investigations of alleged wrongdoing by employees is not limited by the restrictions of criminal laws, the investigation should be conducted in a manner which allows any wrong to be detected but protects the interests of the accused.

A variety of techniques can be used to conduct investigations, and most of them have been discussed in this monograph. Some of the techniques may not be available in certain states or districts because of state laws or district policies. Likewise, one technique will not necessarily satisfy the needs of an investigation while combining that technique with one or more others may be just what is needed to achieve the result. The suggestions on how to utilize each of these techniques are made in the context of securing a resolution to the allegation while protecting the interest of the accused. While there is no magic in some of the suggestions such as when, where, and how to hold a meeting, experience has shown that these techniques work more often than not to achieve the overall objective. Every situation has its unique aspects, however, so different responses may be called for to resolve each problem.

Successful investigations begin with planning and end with a result. In between these two points, considerable leadership and skill must be applied. Although a supervisor, lawyer, or central office person may actually coordinate the investigation, the active participation of the employee's immediate supervisor is important to a success-

ful investigation. Without the immediate supervisor assuming leadership responsibility, the task then falls to others who are less familiar with the players and do not have responsibility for their daily supervision. Investigators should always treat people with whom they come into contact in the same manner that they would expect to be treated by representatives of government. Care must be exercised to avoid trampling on the dignity of an accused. By doing so, the objective of the investigation should be obtainable and the school continuing to function after the investigation is history.

END NOTES

1. Title 42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

2. The Tenth Circuit has recently relied upon the reasonableness standard announced in *T.L.O.* to approve the dismissal of a complaint against a vice principal who conducted a twenty-minute interrogation of a student about whether the student had called in a bomb threat. The student alleged that the administrator had threatened him with felony prosecution and questioned him in an intimidating and coercive manner, violating his rights under the Fourth, Fifth, and Fourteenth Amendments. *Edwards v. Rees*, 883 F.2d 882 (10th Cir. 1989).

3. Individual contracts, collective bargaining agreements, state statutes, or school district policies may provide more significant procedural safeguards prior to the termination of an employee, so these sources should be examined on a case-by-case basis before suspension or termination. *See e.g., Skeets v. Johnson*, 805 F.2d 767 (8th Cir. 1986).

4. This method, like many others suggested in this monograph, may be prohibited or impractical because of a state law, collective bargaining agreement, or school board policy.

5. *Baxter v. Palmigiano*, 425 U.S. 308 (1976). As to the privilege against self-incrimination, the constitutional protection prohibits a person from being compelled *"in any criminal case"* to be a witness against himself. U.S. Const. Amend. V. Although the Fifth Amendment privilege has been found over the years to apply in a variety of formal proceedings beyond merely a criminal trial, *see e.g., Early v. People*, 142 Colo. 462, 352 P.2d 112, 117, *cert. denied.* 364 U.S. 847 (1960), it has not been extended to encompass the making of self-incriminating statements which merely impact one's employment situation.

6. *See United States v. Kordel*, 397 U.S. 1 (1970); *Arthurs v. Stern*, 560 F.2d 477 (1st Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Peiffer v. Lebanon School Dist.*, 848 F.2d 44 (3rd Cir. 1988) (There is no due process right to stay a disciplinary or termination hearing until after the criminal trial and

no privilege to withhold testimony from the school board.); *Rosenberg v. Board of Education of School District #1,* 710 P.2d 1095 (Colo. 1985).

7. *See e.g.,* TEX. CIV. STAT.. ANN., ART. 6252-16 (also known as the "Texas Whistleblowers Act").

8. *See e.g.,* ELKOURI and ELKOURI, HOW ARBITRATION WORKS, 617 (1984), and *Sanders v. U.S. Postal Service,* 801 F.2d 1328, 1330 (D.C. Cir. 1986). "A nexus between the conduct and the efficiency of the service may be presumed where the conduct is egregious and has an obvious adverse effect on the efficiency of the service. This is true even where the conduct is off duty."

9. Failure of the school district to follow its own procedures may, of itself, be violative of the employee's due process rights. Ordinarily, however, only where disregard of rules results in a procedure which in itself impinges upon due process rights does a justiciable cause of action arise. The procedural error must impinge upon an individual's property or liberty right to constitute a violation due process. *See Atencio v. Board of Educ.,* 658 F.2d 774 (10th Cir. 1981); *U.S. v. Cacares,* 440 U.S. 741, 99 S. Ct. 1465 (1979); *Levitt v. Utep,* 759 F.2d 1224 (5th Cir. 1985). Failure to follow procedures in connection with nonrenewals seldom results in a denial of due process justifying reversal of the board's decision. *See e.g., Roberts v. Lincoln County School Dist. No. 1,* 676 P.2d 577 (Wyo. 1984); *Smith v. School Dist. No. 45,* 666 P.2d 1345 (Or. App. 1983); *Schaub v. Chamberlain Board of Educ.,* 339 N.W.2d 307 (S.D. 1983). Terminations, however, require "substantial compliance" with procedures to be effective. *See Piacitelli v. Southern Utah State College,* 636 P.2d 1063 (Utah 1981); *Gee v. Alabama State Tenure Comm'n,* 419 So.2d 227 (Ala. Cir. App. 1982). Failure to comply with time requirements is usually not fatal to the board's ability to dismiss. *See e.g., Compton Coll. Fed. of Teachers v. Compton Community Coll. Dist.,* 166 Cal. Rptr. 595 (Cal. App. 1980) (thirty-day determination period was directory, not mandatory); *Davis v. Barr,* 646 S.W.2d 914 (Tenn. 1983) (failure to give notice of findings within ten days merely tolled time for appeal); *State ex rel. Webb v. Board of Educ. of Bryan City School Dist.,* 460 N.E.2d 1121 (Ohio 1984) (failure to hold hearing within thirty days did not preclude dismissal). Failure to substantially follow evaluation procedures is more difficult to overcome. *Cf. Lipan v. Board of Educ., County of Hancock,* 295 S.E.2d 44 (W. Va. 1982) (failure to comply with state mandated evaluation policy prevented discharge) *with Wood v. Indep. School Dist. No. 141,* 661 P.2d 892 (Okla. 1983) (strict compliance with evaluation procedures not required). The failure of administrators to follow evaluation procedures may not be a problem where the final authority is with the board. *Board of Trustees of Commun. Dist. No. 513 v. Krizek,* 446 N.E.2d 941 (Ill. App. 1983).

10. *See e.g., Continental Airlines, Inc. v. Keenan,* 731 P.2d 708 (Colo. 1987).

11. In drug and alcohol abuse cases, for example, professionals in treatment programs may provide great assistance, both in alerting the investigator to the common, identifiable reactions or symptoms of an involved employee and to assist in the interview itself.

12. As of 1986, the following states prohibited the use of polygraphs by private employers as a condition of employment or continued employment: Alaska, Connecticut, Delaware, Hawaii, Idaho, Iowa, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Washington, West Virginia, Wisconsin, and the District of Columbia. The following states regulate the competence of polygraph examiners and the administration of the exam: Alabama, Arkansas, California, Florida, Indiana, Kentucky, Louisiana, Michigan, Mississippi, North Carolina,

North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Vermont. The following states license examiners and limit the areas of inquiry: Arizona, Georgia, Illinois, Nevada, New Mexico, and Tennessee.

13. Those states include Colorado, Kansas, Missouri, New Hampshire, Ohio, and Wyoming.

14. For a complete review of the practical aspects of evaluating employee performance and the results of investigations, *see* K. Frels & J. Horton, A Documentation System for Teacher Improvement or Termination, Monograph, National Organization on Legal Problems of Education, Rev. Ed. 1988.

15. Two United States Supreme Court cases in 1975 interpreted a provision of the National Labor Relations Act to provide an employee with the right to representation in investigatory interviews. *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975); *International Ladies' Garment Workers' Union v. Quality Manufacturing Co.*, 420 U.S. 276 (1975). *Even though the Act does not apply to public school districts,* the decisions give insight. The Court concluded that an employee must request the representation and also reasonably believe that the investigation will result in disciplinary action. Within the investigatory interview context, the Court was concerned that "[a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Weingarten* at 262-63. *Compare Slaughter v. National Labor Relations Board,* 876 F.2d 11 (3rd Cir. 1989), holding that a nonunion employee was not entitled to have a fellow employee of his choice present at a meeting with his supervisor. On remand, the NLRB concluded that *Weingarten* should not be extended to nonunion situations.

16. *Weingarten* at 259-60.

APPENDICES

APPENDIX A

CONCERNS POLICY

Occasionally an employee will have a concern or a problem which is not within the definition of a grievance. For the most part, these concerns are of an administrative nature which can be resolved through an informal process without the involvement of the Board. Concerns which fall within these specific areas may be brought to the administration's attention through the concern process. These concerns include, but are not limited to:

- Concerns which do not fall within the grievance policy's definition of a grievance,
- Employee performance evaluations or reviews, and
- The nonrenewal of any employment contract.

Employee concerns of the nature described above must first be presented to the employee's immediate supervisor. If the matter is not resolved to the employee's satisfaction by the immediate supervisor, the employee may discuss the matter with the appropriate successive administrators until the employee has been satisfied or after the Superintendent or his or her designee has met with the employee. Employee concerns which are presented through this informal process shall terminate with the Superintendent, with no direct appeal to the Board. However, employees who continue to have an unresolved concern may appear before the Board under the policy for hearing of citizens. The hearing of citizens policy is available to both employees and patrons of the District to express concerns about the District by making a presentation to the Board.

APPENDIX B

COMPLAINT FORM

Person filing this complaint: _____
Position/school: _____
Telephone: _____
Statement involves complaint against whom: _____

Please describe in detail the events surrounding the complaint against the above-named person. Please include dates, time, locations, persons present, substance of statements, and conversations, etc. Please be as factual as possible. If you must express an opinion, please make it clear that you are doing so:

(multiple pages if necessary)

Note: When you are finished, please reread your statement in its entirety. Make any necessary changes and initial those changes. Then initial each sheet in the top lefthand corner. Sign and date below.

I affirm that the above statement is the truth to the best of my knowledge.

_____	_____
Signature Date	Signature Date
Person making statement	Person receiving statement

APPENDIX C

AFFIDAVIT*

*This Affidavit has been designed to seek information about the alleged theft of school property and services. This Affidavit should be administered only after consultation with an attorney.

STATE OF _____)
) ss:
COUNTY OF _____)

_____, being first duly sworn upon oath, based on his/her personal knowledge, answers the following questions as noted in his/her handwriting on these and the attached _____ pages,which were propounded by duly authorized officials of the _____ School District ('School District") concerning activities associated with his/her employment:

1. What is your name?
2. What is your current position of employment with the School District?
3. Have you been advised by an official of the School District, and do you understand that you are required to answer the questions contained in this affidavit as a condition of your employment, and if you fail or refuse to answer the questions contained in this affidavit that your employment may be terminated?
4. Do you understand that giving a false or otherwise untrue answer to any of these questions in this affidavit could result in a criminal charge of perjury being brought against you and that such failure to give a truthful answer to a question in this affidavit could also result in the termination of your employment?
5. Have you been advised by an official of the School District, and do you understand that this affidavit will not be used against you as evidence by the School District in any attempted criminal prosecution except for a charge of perjury which might arise from the answering of these questions and the execution of this affidavit?
6. Do you understand that when a question in this affidavit asks if you have knowledge of or if you know of an instance or situation, it means that you are expected to relate any knowledge you may have about the incident, whether it be personal knowledge or information received from other people, and to relate the source of your knowledge or information?
7. How long have you been in your current job position?
8. What are your specific responsibilities in your current position?
9. Have you ever taken any school supplies or materials owned by the school and used them personally? If so, what were the circumstances (including the supplies or materials taken)?
10. Have you ever taken any school supplies or materials owned by the school to your home for your personal use? If so, what were the circumstances (including the supplies or materials taken)?
11. Have you ever had anyone take any school supplies or materials owned by the school to your house? If so, what were the circumstances (including the supplies or materials taken)?
12. Have you ever allowed any students or other employees to take school supplies or materials to their homes for their personal use? If so, what were the circumstances (including the supplies or materials taken)?

13. Have you ever yourself taken any school supplies or materials owned by the school home for any purpose whatsoever? If so, state the circumstances (including the supplies or materials taken) and the purpose.
14. Have you ever had anyone take any school supplies or materials owned by the school to your house for any purpose whatsoever? If so, state the circumstances (including the supplies or materials taken) and the purpose.
15. Have you ever allowed any students or other employee to take any school supplies or materials to their homes for any purpose whatsoever? If so, state the circumstances (including the supplies or materials taken) and the purpose.
16. Do you have any knowledge of any students or employees taking school supplies or materials home for any purpose whatsoever? If so, relate what was taken, who took the supplies or materials, the date or approximate date on which they took the materials, how you acquired your knowledge and whether you know if they returned those materials to the school.
17. Have you ever sold or traded for anything of value any school supplies or materials owned by the school to any person whatsoever? If so, relate the circumstances of the sale or trade (including the supplies or materials traded or sold).
18. Have you ever solicited, accepted, or agreed to accept any benefit, item of value, service, or gift from any vendor or potential vendor of the School District? If the answer is yes, state, in detail, the nature of the benefit, item of value, service, or gift; the vendor or potential vendor it was received from; and the dates when received.
19. Do you know of any former or current School District employees who have solicited, accepted, or agreed to accept any benefit, item of value, service, or gift from any vendor or potential vendor of the School District? If the answer is yes, explain, in detail, including the name of the employee or former employee who did it and the vendor or potential vendor involved.

(Employee Name)

Subscribed and sworn to before me this _____ day of _____, 19__ .

Witness my hand and official seal.
My commission expires: _____.

_____

(SEAL) Notary Public

APPENDIX D

STAFF HEALTH AND SAFETY PROCEDURES

Procedures for Testing for the Presence of Drugs, Alcohol, or Controlled Substances

These regulations are promulgated by the Board of Education toward the end of creating a drug-free school environment. Enhanced productivity, employee safety, and decreased health and accident costs are the intended products of this policy. Moreover, because School District employees supervise and act as role models for the students of this District, these regulations are also intended to promote and protect student health and safety.

The Superintendent or designee may require an employee to undergo a blood or urinalysis test to determine the presence of alcohol, drugs, or controlled substances in an employee's system under the following circumstances:

1. When such test is administered in connection with a required pre-employment physical;
2. When such test is performed in connection with routine required periodic physicals;
3. When such test is supported by a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee has been under the influence of drugs, controlled substances, or alcohol on school property or during the workday.

The employee shall submit to an examination under these circumstances, and a refusal to submit shall constitute insubordination and may result in disciplinary action consistent with Board policies and applicable law. The results of such examinations shall be released directly to the District by the physician or other person conducting the examination. The District will pay the cost of the examination.

The test will be administered by a person of the District's choice ("testing facility"), which person shall be qualified to perform the examination using testing methods that are technologically current and procedures that are legally adequate. These procedures will provide for the following:

1. Proper collection and storage of the sample and documentation of the chain of custody of a sample;
2. Application of the same or an alternative testing method to confirm results that show "positive" initially; and
3. The preservation of a specimen sample by the testing facility for use by the employee.

When a positive test is utilized by the District as a basis for disciplinary action, due process procedures required by District policies and state and federal law shall apply and the employee shall be given an opportunity to rebut or explain the results of the test.

Test results and other personally identifiable medical information received by the District as a result of the application of this procedure shall be treated as confidential and will only be disclosed in connection with and as required by the procedures and proceedings contemplated by this regulation.

APPENDIX E

SAMPLE LETTER OF SUSPENSION (ADMINISTRATIVE LEAVE)

Date

HAND-DELIVERY

Mr. Terry Teacher
100 South Street
Ourtown, U.S.A.

Dear Terry:

This letter is provided as a follow-up to our conference today and will confirm various things we discussed at that time. The purpose of our meeting was to preliminarily review the facts and nature of allegations which have been made concerning alleged improper sexual conduct by you with various students. We reviewed with you the information we currently have and provided you with an opportunity to respond to the allegations.

Based upon the nature of the charges, we believe it to be in your best interests and those of the School District that you be temporarily relieved of your teaching duties until a thorough investigation can be completed and a decision reached as to how the matter will be resolved. Therefore, this will confirm that you will be on administrative leave with full pay and benefits as of today, until further notice. Placing you on administrative leave is not any determination of guilt or wrongdoing.

During the period of administrative leave, you will not be able to participate in District activities, and you are not to return to the School, whether during working hours or after, unless prior arrangements have been made with Mr. Peter Principal. Your contacts during this period should be with or through Mr. Principal. If you have any questions, please call him. He may require that you check with him periodically by telephone. If you have not already done so, you should arrange with him to obtain your personal belongings and turn over District property currently in your possession by _____, 19__ . This will be scheduled after school hours.

Unless you receive notice from Mr. Principal to the contrary, we have scheduled a meeting with you to be held _____, 19__ , to review the status of the investigation and to advise you of any recommendations or decisions made. You may have a representative present with you at that time. Should there be any inquiries by others of you concerning this matter or the investigation, you may refer them to me, the School District's attorney, or to your own personal representative.

If you have any questions concerning your status, your responsibilities, or the District's expectations during this period, please contact me or Mr. Principal by _____, 19 __, for clarification.

Sincerely,

Superintendent of Schools

APPENDIX F

INVENTORY OF PROPERTY REMOVED*

The following items were removed from the _____ Independent School District facilities located at

_____ (address)

by_____ (name of employee) at _____ (date and time). The items were removed at the direction of _____ (name), and the removal was verified by _____(name of person present).

No. of Items	Item Description
1.	
2.	
3.	
4.	
5.	
6.	
7.	

The above information is correctly recorded, and I acknowledge that I received custody of the property. This property belongs to me, and I am entitled to have it in my possession.

/s/ _____ /s/ _____

Person witnessing removal Employee

*A similar inventory can be prepared for school property returned by the employee.

APPENDIX G

SAMPLE MEMORANDUM
FINDING OF WRONGDOING AND DIRECTIVE

TO: Terry Teacher

FROM: Paul Principal

DATE: January 31, 1987

RE: Allegation of Wrongdoing Made by Sara Schoolmarm

This memorandum contains my findings concerning my investigation of the allegations made against you by Sara Schoolmarm. Ms. Schoolmarm accused you of harassment and intimidation in your actions toward her. The reason advanced by Ms. Schoolmarm for your actions is apparently based on the apparent rejection of sexual advances you made toward Ms. Schoolmarm. After meeting with you on January 3, 1987, to discuss the complaint with you, I spoke with two teachers who corroborated the story of Ms. Schoolmarm – Winning Coach and Caring Counselor. My investigation has indicated that you did in fact make sexual advances to Ms. Schoolmarm and that after being told they were unwelcome, you continued to make sexual advances. This behavior on your part is unacceptable and in violation of Policy XES.

You are directed to refrain from any further intimidation or harassment of Ms. Schoolmarm. Furthermore, you are directed not to make any sexual advances toward Ms. Schoolmarm or any other employee or student while performing your duties at school. A copy of this reprimand and directive will be placed in your personnel file. If you violate this directive, I will have no choice but to recommend to the Superintendent that your employment with the District be terminated immediately.

If you have any questions concerning my findings or these directives, or if you disagree with the facts or conclusions stated in this memorandum, please advise me in writing no later than_____(date), so we can meet and work out any remaining differences.

/s/

_____

Paul Principal

I have received a copy of this memorandum. I understand that my signature does not necessarily constitute agreement with its contents, and that I have the opportunity to respond if I am in disagreement.

/s/

_____ _____

Terry Teacher Date

cc: Personnel File

APPENDIX H

SAMPLE MEMORANDUM
NO WRONGDOING FOUND

TO: Terry Teacher

FROM: Paul Principal

DATE: January 31, 1987

RE: Allegation of Wrongdoing Made by Sara Schoolmarm

This memorandum addresses the allegations of wrongdoing asserted against you by Sara Schoolmarm. Specifically, Ms. Schoolmarm alleges that she has been the subject of harassment and intimidation by you at school during recent weeks. This harassment and intimidation, according to Ms. Schoolmarm, arose from her rejection of alleged sexual advances made toward her by you. I have conducted an investigation of these allegations, and have found no witnesses to corroborate Ms. Schoolmarm's story. Since I do not know which of you to believe, I am closing this matter for lack of evidence.

Although I have not found that you engaged in the wrongdoing as alleged by Ms. Schoolmarm, I have a suggestion for your future dealings with Ms. Schoolmarm. I feel that to the extent possible, you should avoid contact with Ms. Schoolmarm while at school in order to diminish the chances of such allegations arising again in the future.

If you have any questions concerning my findings or these directives, or if you disagree with the facts or conclusions stated in this memorandum, please advise me in writing no later than _____ (date), so we can meet and work out any remaining differences.

/s/

_____

Paul Principal

I have received a copy of this memorandum. I understand that my signature does not necessarily constitute agreement with its contents, and that I have the opportunity to respond if I am in disagreement.

/s/

_____ _____

Terry Teacher Date

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Authorized Signature Exp. Date

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Name _____

Title _____

Organization _____

Street Address _____

City _____ State _____ Zip _____

Phone (_____) _____

❒ Bill me using P.O. Number _____

❒ My district is an NSBA Direct Affiliate, DA # _____

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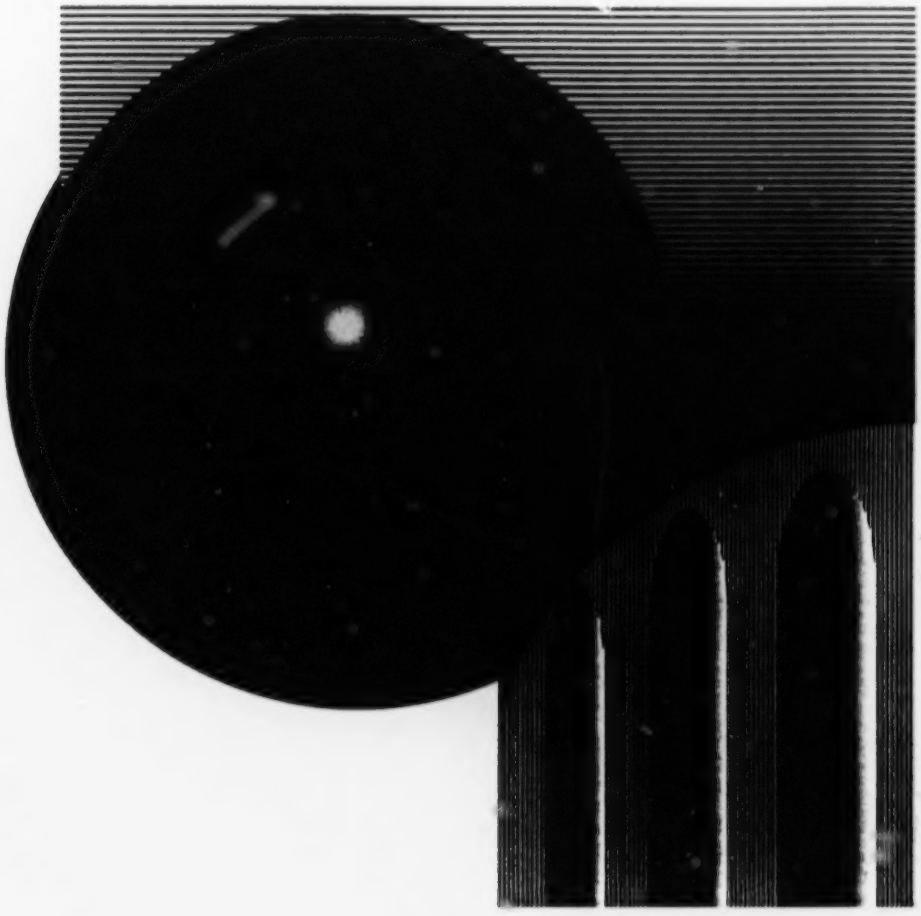

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